UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity, Plaintiff, -against- MALCOLM BRICKLIN, an individual; JONATHAN BRICKLIN, an individual; BARABARA BRICKLIN JONAS, an individual; MICHAEL JONAS, an individual; SANIA TEYMENY, an individual; SCOTT GILDEA, an individual; and VISIONARY VEHICLES, LLC, a limited liability company; Defendants.	07 Civ. 4113 (LLS)

MEMORANDUM OF DEFENDANTS VISIONARY VEHICLES LLC,
MALCOLM BRICKLIN, JONATHAN BRICKLIN,
BARBARA BRICKLIN JONAS, MICHAEL JONAS, AND SANIA TEYMENY
IN SUPPORT OF THEIR MOTION TO DISMISS

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Defendants Visionary Vehicles LLC ("VV"), Malcolm Bricklin ("Bricklin"), Jonathan Bricklin, Barbara Bricklin Jonas, Michael Jonas and Sania Teymeny, through their attorneys, Scarola Ellis LLP, submit this Memorandum in support of their motion to dismiss plaintiff Chinese Automobile Distributors of America, LLC's ("CADA") complaint, filed May 25, 2007 (the "Complaint"), for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

Preliminary Statement

CADA's Complaint alleges as its sole basis for federal subject matter jurisdiction that certain statements made by Bricklin and VV in connection with CADA's investment in VV were fraudulent under the Securities and Exchange Act of 1934. CADA has not, however, met its burden to plead the fraud it alleges with particularity, and has entirely neglected to plead other necessary elements of its claim under Section 10(b) and Rule 10b-5. As discussed below, CADA's allegations do not meet the general standards of Fed. R. Civ. P. 9(b) for particularity in pleading fraud, or carry the related minimum burdens imposed by the Private Securities Litigation Reform Act ("PSLRA") for actions of this type. CADA's Section 10(b) and Rule 10b-5 claim should therefore be dismissed.

The parties to this lawsuit are not of diverse citizenship, and the federal securities claim provides the only basis for federal subject matter jurisdiction. Therefore, upon dismissal of CADA's Section 10(b) claim, CADA's state law claims should be dismissed as well.

Statement of Facts

The pertinent allegations of the Complaint, in summary, are these: Malcolm Bricklin is the Chief Executive Officer of VV, a venture established to partner with Chinese manufacturers of automobiles for the purpose of importing, distributing and selling them in North America. Complaint at ¶¶ 1 and 3. CADA is an investor in VV.[1] *Id.* at ¶ 18. CADA's Complaint alleges numerous facts — disputed by these defendants — in support of various state common law claims. *Id.* at ¶ 26-27. CADA further asserts that four "representations" by Bricklin provide it with the basis for a securities fraud action. *Id.* at ¶ 20.

For purposes of this motion to dismiss, the Court need only examine the sufficiency of the plaintiff's effort to plead securities fraud, which may be summed up in the following allegations: On or about October 21, 2005, CADA alleges that it made a $2 million investment in VV (in exchange for 800,000 units in VV) to provide funding for VV to pursue a joint venture with a Chinese auto maker known as "Chery." *Id.* at ¶ 18. CADA does not raise a securities fraud complaint about that investment. In February and March 2006, CADA made another $2 million investment in VV in exchange for more units in VV. *Id.* at ¶ 21. CADA contends, without particularization and in purely conclusory fashion, that this second investment was fraudulently induced by Bricklin, *Id.* at ¶¶ 21-22, and was rendered "worthless," *Id.* at ¶ 27, when the "[j]oint [v]enture [with Chery] [c]ollapse[d]," *Id.*, Section Title, at p. 7, because of Bricklin's unwillingness to give control of the venture to prospective investors. *Id.* at ¶¶ 23-24.

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[1] In fact, CADA's allegations that VV decided to forego certain business combinations and sources of financing that CADA, apparently, would have preferred VV to embrace, are very much at the core of the parties' true business dispute. *Id.* at ¶¶ 23-24.

The totality of CADA's fact allegations to support its federal securities fraud claim are merely these:

> "20. Throughout the period from December, 2005 through February, 2006, in order to induce Plaintiff to make additional investments in Visionary Vehicles, Malcolm Bricklin made the following representations to Bruce and David Rothrock:
>
> a. The relationship between Malcolm Bricklin and Chery was very strong. Chery credited Malcolm Bricklin, Visionary Vehicles, and the publicity surrounding the joint venture, for much of Chery's success and growth in 2005. Chery preferred to deal with Malcolm Bricklin rather than any other automobile manufacturer and, therefore, Chery would extend the time required to fund the joint venture beyond the original deadline by which funding had to be obtained.
>
> b. Visionary Vehicles was successfully selling the Territories and had commitments of $50,000,000 (fifty million dollars). However, Visionary Vehicles needed an additional $2,000,000 (two million dollars) to survive until the joint venture with Chery was formed and approved.
>
> c. Visionary Vehicles required additional funding to make payroll. If Visionary Vehicles was unable to meet its payroll demands, Visionary Vehicles would lose important personnel who would be instrumental in obtaining the exclusive distribution agreement with Chery.
>
> d. Visionary Vehicles was in danger of filing bankruptcy. If Visionary Vehicles did file for bankruptcy, Plaintiff could lose its First Investment.
>
> "21. As a result of the aforementioned representations and relying on the truth thereof, CADA made an additional investment in the total amount of $2,000,000 (two million dollars) ("Additional Investment"). Specifically, Plaintiff invested $1,000,000 (one million dollars) on or about

> February 21, 2006; and another $1,000,000 (one million dollars) on or about March 17, 2006, in exchange for more Units and additional territories.
>
> "22. The aforementioned representations were false and, upon information and belief, were known to be false by Bricklin when made by him for the purpose of inducing the Additional Investment by CADA in reliance upon the truth of the representations. Upon information and belief, and as more fully set forth below, the aforementioned statements were false because, among other things:
>
> a. Visionary Vehicles raised far less than $50 million in commitments from investors; and
>
> b. Visionary Vehicles was in financial difficulty not because of the necessity of keeping important personnel on the payroll, but because Visionary Vehicles was being systematically looted by Malcolm Bricklin and the other Defendants."

Id. at 20-22.[2] As discussed below, because the securities fraud claim is deficiently pled and the other claims are without independent jurisdictional bases, the Complaint must be dismissed in its entirety.

Argument

To state a prima facie claim under section 10(b) and rule 10b-5, a plaintiff must allege that the defendant, (i) in connection with the purchase or sale of securities, (ii) made a materially false statement or omitted a material fact, (iii) with an intent to deceive, manipulate or defraud, and that (iv) plaintiff's reliance on defendant's action caused injury to the plaintiff. *In re eSpeed, Inc. Securities Litigation,* 457 F.Supp.2d 266, 277-278 (S.D.N.Y. 2006), citing *Lawrence v. Cohn,* 325 F.3d 141, 147 (2nd Cir. 2003) and *Ganino v. Citizens Utils. Co.,* 228 F.3d 154,

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[2] Count Three of the Complaint, setting forth the direct pleading of the federal securities fraud claim, merely refers to these earlier allegations and asserts the elements of a 10(b) claim in conclusory language.

161 (2nd Cir. 2000). As discussed below, CADA's securities fraud claim fails on nearly every ground: CADA has not adequately alleged any materially false statement, actionable *scienter*, reliance or causation.

I.

CADA HAS NOT IDENTIFIED ANY MATERIALLY FALSE STATEMENT OR OMISSION WITH THE REQUISITE PARTICULARITY

Securities fraud actions are subject to the heightened pleading standards of Rule 9 and the PSLRA. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, --- S.Ct. ----, 2007 WL 1173208, at *4-5 (2007); *see also In re eSpeed,* 457 F.Supp.2d at 277-278; *In re IAC/Interactivecorp Securities Litigation,* 478 F.Supp.2d 574, 585 (S.D.N.Y. 2007). Specifically, the PSLRA requires that the complaint specify, for each material misrepresentation and omission, that is, for each statement alleged to have been misleading, the reason or reasons why the statement is misleading. *In re eSpeed,* 457 F.Supp.2d at 277-278; *In re IAC/Interactivecorp Securities Litigation,* 478 F.Supp.2d 574, 585 (S.D.N.Y. 2007). Moreover, if an allegation regarding the statement or omission is made on information and belief, as many of CADA's allegations are (*see, e.g.,* Complaint at ¶¶ 22-24, 26, 29 and 37) the complaint must state with particularity all facts on which that belief is based. *Id.* CADA simply has not met these high standards with the allegations of its Complaint. In fact, as discussed below, it is clear that CADA's Complaint fails to allege *any* specific misrepresentation by Bricklin or VV in connection with CADA's investment. Moreover, with respect to the statements CADA has identified, it is clear that they would not be considered material even if they were particularly identified and adequately alleged to have been false.

A. *CADA Has Not Identified Alleged Misstatements with Particularity.*

In its Complaint, at ¶¶ 20(a)-(d), CADA identifies four categories of "representations" by Bricklin and, at ¶ 22, summarily alleges that "[t]he aforementioned representations were false and, upon information and belief, were known to be false by Bricklin when made by him... ." (These allegations are quoted above in the Statement of Facts.) Significantly, however, these allegedly false statements are nowhere directly contradicted by further specific factual allegations. The statements identified are not, moreover, alleged to have been part of any particular communications or conversations, or alleged to exist anywhere in documentary form. They are not tied to any particular meeting or any particular date, or even identified as having been directed at any given time to any single person. Rather, CADA broadly alleges that the representations were made "[t]hroughout the period from December, 2005, through February, 2006" and that they were made "to Bruce and David Rothrock" without further specifying when, where, or how. Complaint at ¶ 20. This is clearly insufficient under the pleading requirements governing such claims. As the Southern District has consistently affirmed, in the context of securities fraud claims the Rule 9(b) requirement means that "the complaint must (1) specify statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements are fraudulent." *In re IAC/Interactivecorp,* 478 F.Supp.2d at 585; *see also Serova v. Teplen,* 2006 WL 349624, at *6 (S.D.N.Y. 2006); *Greenwald v. Orb Communications & Marketing, Inc.,* 192 F.Supp.2d 212, 225 (S.D.N.Y. 2002).

The lack of particular pleading on the part of CADA hampers the defendants' ability to evaluate the claims against them. It is not possible to evaluate the precise language of the alleged statements, the context in which they were allegedly made, or their truth at the time they were allegedly made. As filed, CADA's Complaint is so deficient as to leave it unclear not only *how* and *when* defendants are supposed to have misrepresented themselves to CADA, but *what* misrepresentation is supposed to have occurred. As the Second Circuit has recognized, this is precisely the sort of pleading that Rule 9(b) and the PSLRA were intended to preclude.

> "The particularity requirement of Rule 9(b) serves to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit."

Rombach v. Chang, 355 F.3d 164, 171 (2nd Cir. 2004)(applying the 9(b) standard to all claims sounding in fraud and dismissing the complaint for failure to plead with sufficient particularity); *see also Tellabs,* WL 1173208, at *4 ("[p]rivate securities fraud actions ... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law. As a check against abusive litigation by private parties, Congress enacted the [PSLRA]"). These valid policy concerns illustrate why CADA's Complaint should be dismissed for its prejudicial failures of precision alone.

B. CADA Has Not Alleged with Particularity that the Statements Identified Were False.

The alleged statements identified in ¶¶ 20(a)-(d) are nowhere specifically contradicted by other statements or facts in the Complaint. As the Second Circuit has previously held in considering 10(b) actions, "[t]o succeed on this claim, plaintiffs must do more than say that the statements [they identify] were false and misleading; they must demonstrate with specificity why and how that is so." *Rombach* 355 F.3d at 174 ("plaintiffs fail to allege with particularity any actual falsity in defendants' press releases"). CADA fails in this regard, since it makes no particularized factual allegation that any of the four alleged representations identified at ¶ 20(a)-(d) were inaccurate at the time they were made.

CADA may not simply allege, as it does in ¶ 22, that "the aforementioned representations were false." Rather, "[w]here plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information." *Novak v. Kasaks,* 216 F.3d 300, 309 (2nd Cir. 2000). The *Rombach* court, notably, was confronted with allegations much more specific and detailed than CADA has offered in this regard, but nonetheless determined that no misstatement had been adequately alleged. *Rombach,* 355 F.3d at 174 ("[w]e agree with the district court that there is nothing in the complaint that links the actual and projected revenues of these four facilities to plaintiff's claim that the financial projections contained in the slide are false or misleading"). Where, as here, "plaintiffs fail to allege with particularity any actual falsity" in defendants' alleged statements, no claim under Section 10(b) and Rule 10b-5 has been stated. *Id.*

The statements alleged in ¶ 20(a), *viz.,* that "the relationship between Malcolm Bricklin and Chery was very strong," that "Chery credited Malcolm Bricklin, Visionary Vehicles, and the publicity surrounding the joint venture, for much of Chery's success and growth in 2005," that "Chery preferred to deal with Malcolm Bricklin rather than any other automobile manufacturer" and that Chery would, therefore, "extend the time required to fund the joint venture beyond the original deadline," are nowhere specifically contradicted throughout the Complaint. Even if these vague expressions of optimism were otherwise actionable — which, as explained in Section I. C. below, they are not — CADA has failed to plead with particularity, *i.e.*, to "demonstrate with specificity how and why" these statements were false at the time they were made.

This is likewise the case for the statements alleged in ¶ 20(c), that VV "required additional funding to make payroll," and that if it "was unable to meet its payroll demands," it "would lose important personnel who would be instrumental in obtaining the exclusive distribution agreements with Chery." While CADA alleges, in ¶ 22(b) of the Complaint, that "Visionary Vehicles was in financial difficulty not because of the necessity of keeping important personnel on the payroll, but because Visionary Vehicles was being systematically looted by Malcolm Bricklin and the other Defendants," even if this allegation is taken as true for purposes of this motion, there is no contradiction of the ¶ 20(c) statement that VV needed additional funding to make payroll by the ¶ 22(b) allegation that its funding shortfalls were due to malfeasance. CADA nowhere alleges, in other words, that VV in fact did *not* "require[] additional funding to make payroll" or that it would *not*, in that case, "lose important personnel ... instrumental in obtaining the exclusive distribution agreements with Chery." In the absence of such allegations, the statements alleged in ¶ 20(c) have not been contradicted in any way.

For identical reasons, the same is true of the statements alleged in ¶ 20(d), which states that "Visionary Vehicles was in danger of filing for bankruptcy," and that, if it did, "Plaintiff could lose its First Investment." These statements are not contradicted by any other statements or facts presented in the Complaint.

Finally, as to the statements alleged in paragraph ¶ 20(b), CADA creates the appearance of a contradiction through misleadingly juxtaposed language and loose logic that collapses upon scrutiny. Paragraph 20(b) states, in relevant part, that W "was successfully selling the Territories and had commitments of $50,000,000." This is meant to be contrasted with the allegation in ¶ 22(a), that W ultimately "*raised* far less than $50 million in commitments from investors" (emphasis added). Taken together, however, this amounts to no more than an allegation that W did not ultimately raise the full $50 million it had in "commitments." Prospective investor commitments are not alleged to be, and are not, money in the bank, and CADA deliberately confuses that point by referring to W ultimately raising "far less" than $50 million *in commitments* from investors. The former statement (¶ 20(b)) describes what was committed, while the latter (¶ 22(a)) describes what was ultimately raised. CADA conspicuously fails to allege that W *never* had $50 million in investment commitments, or that it did not have $50 million in investment commitments when the alleged misrepresentation was made. Without more, then, CADA's Complaint has presented no allegation that the statement would have been false when it was made.[3]

[3] As discussed above, due to CADA's deficiency in pleading, we do not know the precise form this statement is alleged to have taken, or the date when it was allegedly made. Separately, the bare and vague allegation — presented without any basis or further elaboration — that "far less" was ultimately raised does not meet CADA's burden to allege with specificity why and how the alleged representation of $50 million in commitments would have been false in the first instance. *Rombach,* 355 F.3d at 174. Indeed, on the Complaint provided we do not even know what CADA believes "far less" to be.

CADA has, accordingly, failed to plead facts that show how defendants' alleged statements were false or misleading, and its securities fraud claim should be dismissed. *Rombach,* 355 F.3d at 174.

C. The Statements CADA Has Identified Are Not, in Any Event, Material.

"An alleged misstatement must be material — it is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." *In re eSpeed,* 457 F.Supp.2d at 279. As the court in *eSpeed* went on to note:

> "[C]ourts have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation ... numbingly familiar to the marketplace — loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."

Id. at 80 (citations and internal quotations omitted). Several of the statements CADA identifies from Bricklin are just such optimistic affirmations, including the entire first category of representations CADA alleges Bricklin made in late 2005 and early 2006:

- The relationship between Malcolm Bricklin and Chery was very strong.
- Chery credited Malcolm Bricklin, Visionary Vehicles, and the publicity surrounding the joint venture, for much of Chery's success and growth in 2005.
- Chery preferred to deal with Malcolm Bricklin rather than any other automobile manufacturer and, therefore, Chery would extend the time required to fund the joint venture beyond the original deadline by which funding had to be obtained.

Complaint at ¶ 20(a). As noted above, CADA nowhere pleads facts to suggest any of these assertions were false or misleading.[4] Moreover, accurate or not, they are not actionable as fraud. Nor, in the context of such permissible speech, is the statement alleged in ¶ 20(b) that "Visionary Vehicles was successfully selling the Territories" actionable. "[P]uffery or misguided optimism is not actionable as fraud," even where it takes the form of "financial projections and statements of guarded optimism." *Rombach,* 355 F.3d at 175; and compare *In re IAC/Interactivecorp,* 478 F.Supp.2d at 590-591 (discussing management's similar statements and determining them immaterial). Without knowing the content and context of the statement more precisely, it is equally impossible to exclude the alleged representation of $50 million in investment commitments from the category of loose marketing discourse. On the pleading CADA has provided — bereft of context and detail — Bricklin's alleged statements are immaterial, and amount to no more than permissible optimism.

With respect to the determination of materiality, context is crucial. A long line of Second Circuit precedent establishes that "[t]he test for whether a statement is *materially* misleading is whether the defendants' representations, taken together and in context, would have misled a reasonable investor." *Rombach,* 355 F.3d at 172 n. 7, citing *I. Meyer Pincus & Assoc. v. Oppenheimer & Co.*, 936 F.2d 759, 761 (2nd Cir. 1991) (emphasis added). In this light, the statements alleged in ¶¶ 20(a) and (b) about VV's relationship with Chery and the then-current level of unrealized investment commitments must be considered in context with the alleged statements in ¶¶ 20(c) and (d) — allegations that VV expressly disclosed concerns about W's dire financial straits, inability to meet payroll, and a looming threat of bankruptcy — to determine if, taking all such information together, CADA could claim to have been meaningfully misled. Considering defendants' representations "together and in context" is the recognized rule of the PSLRA, as well as New York's older "bespeaks caution" doctrine, under which cautionary language in statements to investors, if adequate, not only mitigates positive information defendants may contemporaneously provide, but affirmatively creates an explicit safe harbor for defendants' more optimistic assessments of an investment's prospects:

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[4] Similar prospective or promotional statements are referred to at ¶¶ 15 and 17 of the Complaint, but are not challenged by CADA or relied on as a basis for CADA's claims. To the extent CADA would allege that these statements were inaccurate, they are similarly immaterial.

> "When there is cautionary language in the disclosure, the Court analyzes the alleged fraudulent materials in their entirety to determine whether a reasonable investor would have been misled. The touchstone of the inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor."

Rombach, 355 F.3d at 173; *see also In re IAC/Interactivecorp,* 478 F.Supp.2d at 586; 15 U.S.C. § 78u-5(c). "The only exception to this rule is that there may be liability where (1) the forward-looking statement was made with *actual knowledge* that it was false; or (2) where the forward-looking statement misrepresents present facts".[5] *Rombach,* 355 F.3d at 173.

At best, CADA's Complaint alleges representations by Bricklin that present a mixed picture of W's prospects — sufficiently mixed, in fact, to have prompted caution on the part of any reasonable investor. In fact, as noted above,

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[5] Although CADA alleges, on information and belief, that the statements at issue were known to be false, Complaint at ¶ 22, that allegation is not adequate to allege scienter, as discussed in Section II below.

CADA alleges that at the time it made the investment in issue, W cautioned that it was in significant financial difficulty.

In any event, the lack of particularity of CADA's pleading makes it impossible to evaluate the various alleged statements in meaningful context. CADA has not, accordingly, adequately alleged that, on the "total mix" of available information, it may reasonably claim to have been misled by any of the alleged misstatements it has summarily identified. By this measure CADA has alleged no materially misleading statement by defendants and its claim should be dismissed. *Rombach,* 355 F.3d at 175; *In re IAC/Interactivecorp,* 478 F.Supp.2d at 590-591.

II.

CADA HAS NOT ADEQUATELY ALLEGED SCIENTER

To adequately plead scienter under the PSLRA, plaintiffs must allege "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *In re eSpeed,* 457 F.Supp.2d at 281. The required state of mind under Section 10(b) and Rule 10b-5 is "an intent to deceive, manipulate or defraud." *Id.* at 277-278. CADA's Complaint, however, has no relevant factual allegations, but only states "on information and belief" that the representations discussed above were "known to be false by Bricklin when made." Complaint at ¶ 22. If an allegation regarding a statement or omission is made on information and belief, the complaint must state with particularity all facts on which that belief is formed. *In re eSpeed,* 457 F.Supp.2d at 277-278. CADA states no facts to support the averment that, on information and belief, Bricklin knew the alleged statements to be false. It is clear that such baldly conclusory pleading is inadequate, as the Supreme Court clarified in *Tellabs*:

> "[In the PSLRA] Congress did not merely require plaintiffs to provide a factual basis for their scienter allegations, *i.e.*, to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a strong – *i.e.*, a powerful and cogent – inference."

Tellabs, 2007 WL 1773208 at *10. CADA, however, has alleged no facts whatsoever supporting any such inference of scienter, much less the required "powerful and cogent" inference, and its 10b-5 claim should accordingly be dismissed.

III.

CADA HAS NOT ADEQUATELY ALLEGED CAUSATION

"It is settled that causation under federal securities laws is two-pronged: a plaintiff must allege both transaction causation, *i.e.,* that *but for* the fraudulent statement or omission, the plaintiff would not have entered into the transaction; and loss causation, *i.e.,* that the subject of the fraudulent statement or omission was the cause of the actual loss suffered." *Greenwald v. Orb Communications & Marketing, Inc.,* 192 F.Supp.2d 212, 226 (S.D.N.Y. 2002), citing *Castellano v. Young & Rubicam, Inc.* 257 F.3d 171, 186 (2d Cir. 2001); *see also In re eSpeed,* 457 F.Supp.2d at 282-283. CADA's complaint is entirely silent as to whether any of the inadequately alleged misrepresentations could be construed as the but-for cause of CADA's investment or the ultimate cause of any actual loss. This deficiency in CADA's allegations alone is adequate ground for dismissal. *Lentell v. Merrill Lynch & Co. Inc.,* 396 F.3d 161, 172 (2nd Cir. 2005) ("[w]e do not address these alternative bases for dismissal because, assuming away other pleading defects, the district court correctly found that plaintiffs failed to plead that Merrill Lynch's misstatements and omissions caused their investment loss").

A. *CADA Has Not Alleged Any Connection Between Misstatements by Defendants and Any Loss by CADA.*

Although CADA alleges in a conclusory manner that "[t]he materially false and misleading statements and omissions of Malcolm Bricklin have caused Plaintiff to suffer damages of at least two million dollars" (Complaint at ¶ 31), and, still more generally, that "[t]he Plaintiff's investment of $4,000,000 (four million dollars) in Visionary Vehicles is now worthless," (Complaint at ¶ 27), there are no particular allegations connecting economic damages to the alleged misrepresentations that CADA has identified. In fact, CADA's complaint identifies decisions about business combinations and sources of further financing as the cause of its loss on the investment; these issues have nothing to do with the statements CADA points to in the Complaint.

1. *CADA's general and conclusory loss causation allegations are entirely insufficient.*

Even where other elements of a plaintiff's claims are pled in proper detail, mere general averments that plaintiff has been damaged in amounts equal to or exceeding the amounts invested are insufficient to plead 10(b) or 10b-5 loss causation, and complaints that provide no more may be dismissed on this ground alone. *Greenwald v. Orb Communications & Marketing, Inc.*, 192 F.Supp.2d 212, 227-228 (S.D.N.Y. 2002) ("[h]aving concluded that Greenwald has failed to allege loss causation ... the Court need not determine whether the remaining elements of Greenwald's 10(b) and Rule 10b-5 claim have been alleged sufficiently or whether

Greenwald's fraud allegations otherwise meet the specificity requirements of Rule 9"). Accordingly, CADA's general allegations that its investment is now "worthless" or "depleted" does not establish the necessary element of causation in this case. *See* Complaint at ¶¶ 27, 31 and 40. Rather, "[t]o plead loss causation, the complaint[] must allege facts that support an inference that [defendants'] misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud." *Lentell,* 396 F.3d 161, 175. CADA has not made any such allegation. Here, as in *Greenwald*, "the Complaint does not draw a connection between the Defendants' misrepresentations and any foreseeable loss suffered by [plaintiff] on the [investment] as a result of the purchase of that security." *Greenwald,* 192 F.Supp. at 227. Even if CADA's claims of misrepresentation were accurate and adequately alleged — which they clearly are not — the federal securities law claim should be dismissed because CADA fails to connect the alleged misrepresentations to a loss on the investment. *Lentell,* 396 F.3d 161, 172; *Greenwald,* 192 F.Supp. at 227.

2. CADA, in fact, affirmatively alleges that issues other than the allegedly false statements caused the loss on CADA's investment.

"In the case of a 10b-5 action alleging a material misstatement or omission, loss causation generally requires a plaintiff to show that her investments would not have lost value if the facts defendants misrepresented or omitted had been known." *In re eSpeed,* 457 F.Supp.2d at 282-283. CADA's Complaint, to the contrary, affirmatively attributes the lost value of its investment to business decisions that have nothing to do with any misrepresentation. *See* Complaint at ¶¶ 23 – 24.

"The Joint Venture Collapses," according to CADA, in the section of the Complaint with the same title, not because any misrepresentation of Bricklin's is brought to light or otherwise results in harm, but because "[u]pon information and belief, in the summer of 2006, Malcolm Bricklin rejected the financing arrangement with Mr. Soros." *Id.* at ¶ 23. No prior misstatement by Bricklin in connection with any such financing is alleged. The same may be said of the allegation in ¶ 24 that "[a]lthough another potential source of funding was located ... Mr. Bricklin and Visionary Vehicles announced that the joint venture with Chery was canceled." CADA has alleged no prior contrary assurance from Bricklin or VV, much less pled a relevant material misstatement with the particularity required by Rule 9 and the PSLRA. Far from connecting its alleged damages to any alleged misrepresentation, CADA's Complaint affirmatively places the blame for the collapse of the joint venture and the consequent diminution in the value of its investment elsewhere. As such the complaint is deficient and should be dismissed. *In re eSpeed,* 457 F.Supp.2d at 282-283; *Lentell,* 396 F.3d 161, 172; *Greenwald,* 192 F.Supp. at 227.

B. CADA Has Not Alleged Any Connection Between Alleged Misstatements by Defendants and CADA's Decision to Invest.

"Transaction causation is akin to reliance, and requires only an allegation that but for the claimed misrepresentations or omissions the plaintiff would not have entered into the detrimental securities transaction." *Lentell,* 396 F.3d 161, 172. CADA has not effectively alleged even this much. Although CADA has alleged, in ¶ 21, that it invested an additional $2 million in VV "as a result" of Bricklin's alleged misstatements, and in ¶ 40 that "[h]ad Plaintiff known the true financial condition of Visionary Vehicles" it would not have invested further, CADA never even implies that it would not have made that same investment *but for* those inadequately alleged misstatements, in light of W's need for funding. By way of contrast, CADA, already having invested $2 million in W, may well have made the additional investment in issue in response to W's difficult financial condition — for no reason but to attempt to save the company. But, for this Court's inquiry, the point is this — the pleading lacks the necessary allegation of causation. As such, its securities fraud claim should be dismissed on this basis, as well.

IV.

CADA'S PENDENT STATE LAW CLAIMS SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

Where the only basis for federal jurisdiction is an improperly pled 10(b) violation, dismissal of the same leaves no proper basis for jurisdiction over pendent state law claims absent exceptional circumstances. *Greenwald,* 192 F.Supp.2d at 227 ("state law claims are dismissed because there is no appropriate basis for the Court's jurisdiction over these state law claims in light of the dismissal of the federal [claims]"); *CL-Alexanders Laing & Cruickshank v. Goldfeld,* 739 F.Supp. 158, 167 (S.D.N.Y. 1990) (declining to exercise pendent jurisdiction over state claims after federal claims were dismissed where no "exceptional circumstances" were present). While a district court retains discretion to exercise pendent jurisdiction and entertain state law claims once all federal law claims have been dismissed, needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966). CADA's 10(b) claim should, for the reasons discussed above, be dismissed. Because the parties to the action are not diverse, the balance of the CADA

Complaint, which contains no claims supporting federal subject matter jurisdiction, should be dismissed, as well.

Conclusion

For the foregoing reasons, the Court should enter an Order dismissing Count Three of the Complaint for failure to plead the elements of a cause of action under Section 10(b) and Rule 10b-5 with the particularity required by Fed. R. Civ. P. 9(b) and the PSLRA, and dismissing the balance of the Complaint for lack of subject matter jurisdiction.

Dated: June 29, 2007

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By ______________________
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